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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618.

THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. MCLENNAN, *Petitioner*,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the State of Montana, respectively moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

L. A. FOOT,
Attorney General of the State of Montana, as amicus curiae.

Of Counsel:
PETER Q. NYCE,

IN THE

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OCTOBER TERM, 1930.

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THE UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, *Petitioner*,

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Respondent*.

BRIEF OF THE ATTORNEY GENERAL OF MONTANA AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

Pursuant to Section 35 of the Leasing Act, Montana is to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas on public lands within that state. Such money in accordance with the Leasing Act is to be used for the construction and maintenance of public roads, the support of public educational institutions, as the Legislature of the State may direct. Under the terms of this Act, Montana has received up to June 30, 1930, royalties on account of oil and gas amounting to approximately $592,110.57.

The total receipts to the Government on account of oil and gas under the mineral leasing act of February 25, 1920 from the passage of the Act, to June 30, 1930, from lands within the State of Montana, approximates the sum of $1,527,398.75.

There are at the present time, within the State of Montana, in excess of 6,601,677 acres of vacant public lands, subject to disposition under the act of February 25, 1920.

Revenues Derived from Taxes on Tangible Property Within the State of Montana Used in Operations Under Permits Authorized by the Leasing Bill.

A vast amount of money has been expended by permittees, lessees and operators in drilling for oil and/or gas, building roads, bridges, warehouses, camps and machine shops, etc. All of this tangible property is subject to tax by the state and produces revenue. The change in policy in the issuing of oil and gas permits has resulted in a burden to this state because of the loss of revenue from such taxable property.

Employment.

Operations conducted under permits and leases issued under the Leasing Act, provide employment for a vast number of men. The suspension of the Act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in Montana, but in other states as well.

ARGUMENT.

The Intent of Congress.

The intent of Congress in passing the Leasing Act, the question of whether the Secretary of the Interior has discretion to suspend the Act and whether there was an actual withdrawal, are discussed at length in Petitioner's brief and the briefs amici curiae filed on behalf of New Mexico and Utah.

The authority vested in the Secretary of the Interior by the Leasing Act is mandatory and not permissive.

The English Rule.

Mac Dougall v. Paterson, Common Bench Reports 15 Victoria 755, announces the rule as follows:

> "Where a statute confers an *authority* to do a judicial act in a certain case, it is *imperative* on those so authorized, to exercise the authority when the occasion arises, and its exercise is duly applied for by a party interested, and having the right to make the application." (1851.)

In Endlich on Interpretation of Statutes 423 is the end of a discussion of the English cases on this rule in which it is said:

> "But as regards the imperative character of the duty, it was laid down by the King's Bench that words of permission in an act of Parliament when tending to promote the general benefit are always held to be compulsory."

In Mayor v. Furze, 3 Hill 612 (N. Y), Chief Justice Nelson said:

"The inference deducible from the various cases on this subject seems to be that, where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory."

The above case and several others along the same line are cited and followed in People v. Commissioners of Land Office, 207 N. Y. 42, 100 N. E. 735, in the following language:

"It is an old and well recognized rule of statutory construction that when the act to be done concerns the public interest, or the rights of third persons, permissive words conferring power, or authority, upon public officers, or bodies, will be construed as mandatory."

In P. D. Ronde & Company v. United States Sugar Equal. Board, 299 Fed. 659, the following language,

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President is authorized to require the United States Sugar Equalization Board (Inc.) to take over from the corporation P. D. Ronde & Company, Inc., said transaction entered into and carried on by said corporation, etc."

was held to be mandatory on the President.

The court after a careful examination of many authorities including Supervisors v. United States (cited and quoted from at page 16 of Petitioner's brief) decided that the act was mandatory. An appeal was

taken to the Third Circuit Court of Appeals and the case was there affirmed in U. S. Sugar Equalization Board v. P. D. Ronde & Company, 7 Fed. (2d) 981. The Circuit Court of Appeals said:

> "The resolution of Congress by which President was 'authorized' to require U. S. Sugar Equalization Board, Inc., to pay loss to importer of sugar for which Government was morally responsible, held mandatory; 'authorized' meaning 'directed.'"

The court also held that

> "Since Congress may not delegate legislative authority to any person it follows that it may not give to any one absolute discretion to ignore or nullify, without conditions, a law which it has enacted. This would in effect be the delegation of legislative power. Such a delegation of power would involve a discretion of what the law should or should not be, or that it should not be at all." (citing authorities.)

The court stated that the Senate and House Committees regarded this resolution as mandatory and cited cases to show that the reports of the committee's interpretation of the meaning of the resolution are entitled to careful consideration. It is a late case having been decided on August 10, 1925.

The Lord Mansfield Rule.

In 1 Burrow's Report 445, King's Bench, 4th edition, Rex v. Loxdale, Lord Mansfield in 1758 announced the following rule to determine whether an act of Parliament was mandatory or directory. He said:

"There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory. The precise time, in many cases is not of the essence."

This rule has been followed by many courts in the United States.

In Apollo Boro v. Clopper, 44 Pa., Superior Court 405, it was said:

"Perhaps Lord Mansfield's rule in Rex v. Loxdale, 1 Burr. 445, is a better one (and this is the second rule we have in view) that, whether a statute is mandatory or not depends on whether the thing directed to be done is the essence of the thing required."

The same language is used in Norwegian Street, 81 Pa. State 354.

The same statement is made in Deibert v. Rhodes, 140 Atl. 515 (Pa.), where it is also said:

"The test whether a statute is mandatory depends on whether the thing directed to be done is of essence of the thing required."

The court in that case also said:

"Whether particular statute is mandatory or directory does not depend on form but on legislative intent, to be ascertained from consideration of entire act, its nature, its object, and consequences resulting from construing it one way or the other."

The same rule is followed by the Supreme Court of Oregon in Stevens v. Tillamook County, 273 Pac. 716, where it is said:

"It has been said, and we think correctly, that the true distinction between a mandatory statute and one which is only directory is this: Where the provision of the statute is the essence of the thing required to be done and by which jurisdiction to do it is obtained, it is mandatory, but where it relates to form and manner and where an act is incident or after jurisdiction has been obtained it is directory" (citing Potter's Dwarres on Statutes and Constitution, pp. 221 and 225 and footnote, p. 224).

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of Montana says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

CONCLUSION.

Having thus shown that the State of Montana is vitally affected by the action of the Secretary in suspending the Leasing Act of February 25, 1920, through loss of royalties from production thereunder, as a result of the loss of taxes on tangible property used in operation under the said act, and resulting unemployment from the fact that no further permits are being granted on which operations may be conducted, The State of Montana hereby adopts the brief of petitioner filed herein and insists that it was not the intent of Congress that the Secretary of the Interior should suspend the operation of the Act of February 25, 1920 as has been done by the promulgated orders Nos. 337 and 338 referred to in petitioner's brief.

WHEREFORE, it is respectfully urged that this Honorable Court should grant a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, reverse same and direct that a writ of mandamus issue to compel the Secretary of the Interior to receive and file petitioner's application for permit, consider same on its merits and grant a prospecting permit under the Act of February 25, 1920.

Respectfully submitted,

L. A. Foot,
Attorney General of the State of Montana as amicus curiae.

Of Counsel:
Peter Q. Nyce.